No. 82-945

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SURE-TAN, INC. and SURAK LEATHER COMPANY,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

Of Counsel:
JOHN A. MCDONALD
ROBERT A. CREAMER
STEVEN H. ADELMAN, P.C.

MICHAEL R. FLAHERTY
KECK, MAHIN & CATE
8300 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
(312) 876-3400
Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

I. THE BOARD INCORRECTLY CONCLUDED THAT PETITIONERS VIOLATED SECTION 8(a)(3) AND (1) OF THE NATIONAL LABOR RELATIONS ACT BY REQUESTING THAT THE IMMIGRATION AND NATURALIZATION SERVICE INVESTIGATE THE IMMIGRATION STATUS OF ITS EMPLOYEES.

Respondent recognizes that an employer has a right to report a violation of the immigration laws to the INS, but contends that this right is conditioned upon the employer's motive for reporting the violation. (R. Br. 30).[1/] Respondent argues that Sure-Tan must, in effect, pay damages for the admittedly lawful actions of the INS because it reported a suspected violation of the immigration laws to the INS with an improper motive. (R. Br. 28). Neither the NLRA nor the INA condition the right to

---

1/ References herein to the Brief For The National Labor Relations Board will be denoted with the designation "R. Br." References to Brief of Petitioners will be denoted with the designation "P. Br."

report a violation of the law upon the informant's motive; nor does the Constitution permit such abridgment of the right to report a violation of the law.

A. Petitioners' Conduct Did Not Constitute An Unlawful Constructive Discharge.

Relying upon NLRB v. Newton, 214 F.2d 472, 475-476 (5th Cir. 1954) and Goodman Lumber Co., 166 N.L.R.B. 304, 305 (1967), Respondent argues that Petitioners constructively discharged the illegal aliens by creating an intolerable condition that led to their deportation. (R. Br. 27). The cases that Respondent relies on are readily distinguishable from the present case. In Newton, the employer condoned an assault upon an employee by her fellow employees. Following the assault, while the employee was suffering from severe injuries and in need of medical attention, the employer ordered her to either work or get out of

the plant. In Goodman, the employer pressured an employee to convince his son, who was also an employee of the company, to abandon his support for the union. As a result of the father's pressure, the son resigned from the company.

The present case, in contrast, does not involve an employee's decision to terminate his employment induced by violent or coercive conduct illegally taken at the behest of an employer. Rather, it involves employees being removed from the job by actions properly taken by law enforcement officials to enforce federal immigration laws. The abusive conduct of private third parties in Newton and Goodman is not even remotely similar to the law enforcement activities of the INS in the present case. The condition which mandated the deportation of the illegal aliens in this case was their own illegal status, not the action of Sure-Tan.

Respondent argues that there was a "direct causal nexus" between Petitioners' inquiry to the INS and the deportation of the illegal aliens, because Petitioners "knew that the requested INS inquiry would result in the employees' removal from their jobs. . . ." (R. Br. 28). Later, Respondent contradicts this assertion, arguing that: "The INS retains some measure of discretion in deciding whether to institute [deportation] proceedings." (R. Br. 29 n. 32). If, as Respondent suggests, the INS retains discretion in deciding whether to deport an illegal alien, Petitioners could not have been the direct cause of the illegal aliens' deportation; that action, according to Respondent, was discretionary with the INS.

B. Petitioners' Right To Report A Violation of The Immigration Laws Is Not Conditioned Upon Petitioners' Motive For Reporting the Violation.

Respondent recognizes that effective

law enforcement depends upon the conscientious cooperation of the public with law enforcement agencies. (R. Br. 30). Respondent further recognizes that, as a general principle, a person who reports a violation of the law to responsible government officials should not be subject to liability for that action. (R. Br. 35). Respondent argues, however, that liability for reporting a suspected violation of the immigration law should be imposed where the action is taken "for reasons other than a simple desire to cooperate in the enforcement of the INA." (R. Br. 31). Respondent would thus condition a person's right to report a violation of the law upon the Board's conclusions as to the person's motive for reporting the violation.

Contrary to Respondent's argument, this Court recognized in In Re Quarles, 158 U.S. 532, 535 (1895), that:

> It is the duty and the right, not only of every peace officer in

> the United States, but of every citizen, to assist in the prosecuting, and in securing the punishment of, any breach of the peace of the United States. . . . It is likewise his right and his duty to communicate to the executive officers any information which he has of the commission of an offence of those laws. . . .

Mindful of the paramount importance of citizen cooperation with law enforcement agencies, this Court observed that: "[I]t is the duty of [the] government to see that [a citizen] may exercise this right freely, and to protect him from violence while so doing or on account of so doing." Id. at 536. Nowhere in Quarles did this Court condition the right to report a violation of the law on the informant's motive for reporting the violation.

Similarly, in Bill Johnson's Restaurants, Inc. v. NLRB, ___ U.S. ___ , 103 S.Ct. 2161, 2170 (1983), this Court held that where a compelling public interest in the maintenance of domestic peace is involved, the NLRA is not to be enforced

in derogation of that public interest against those who seek to enforce other legal rights, regardless of the person's motive for seeking enforcement of those rights.[2/]

Respondent argues that, although Petitioners may be immune from civil liability for their actions, that immunity does not apply to an action brought against Petitioners by the government. (R. Br. 36). In support of this argument, Respondent cites Briscoe v. Lahue, ___ U.S. ___ ; 103 S.Ct. 1108, 1118 n. 22, 1118-1119 n. 26, 1121-22 n. 32 (1983), wherein this Court observed that witnesses enjoy no common law immunity from criminal

---

2/ Accord, Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc. 365 U.S. 127, 139 (1961), rehearing denied, 365 U.S. 875 (1961) (Right of railroad companies to encourage rigid law enforcement action against competing trucking companies was protected, even though the action was motivated by anticompetitive intent and would have otherwise been unlawful under the antitrust laws); See P. Br. 17.

prosecution for perjury. Briscoe is wholly inapposite because Petitioners, unlike the witnesses in Briscoe, were not accused of providing the government with false information. To the contrary, the illegal aliens in this case admitted their illegal presence in the United States and voluntarily returned to Mexico.[3/]

The same policies mandating immunity from civil liability for a person who reports a violation of the law also mandate immunity from government prosecution. The prospect of liability in a government initiated action for providing law enforcement agencies with information concerning

3/ Likewise, Imbler v. Pachtman, 424 U.S. 409, 429 (1976), and O'Shea v. Littleton, 414 U.S. 488, 503 (1974), cited by Respondent (R. Br. 36.), do not support Respondent's contention that an employer who is immune from civil liability for redress of a private wrong is not immune from liability in an action brought by the government. This Court observed in those cases that, although prosecutors and judges are immune from liability in suits under

(footnote continued)

violations of the law would be just as likely to deter citizens from providing that information as the prospect of civil liability for such action.

Respondent suggests that employers can take solace in, and be protected by, the fact that the Board's General Counsel has unreviewable discretion in deciding whether to file a complaint, and thus can screen cases to ensure that only meritorious complaints are filed. (R. Br. 36). As Judge Wood observed, however, the Board is inclined to "use only its private knothole to view these issues and sees nothing except its

---

Footnote 3/ continued

42 U.S.C. § 1983, they can be punished criminally for willful deprivations of constitutional rights under 18 U.S.C. § 242, the criminal analog of § 1983. The reporting of a violation of the law by a private citizen which properly results in the arrest and prosecution of the wrongdoer, and which does not involve a deprivation of a Constitutional right, is clearly distinct from a willful deprivation of a Constitutional right by a public official.

own labor goals." (J. Wood, Dissent to Order Denying Sure-Tan's Request for Rehearing; 38a). The unreviewable discretion of the General Counsel in deciding whether to issue a complaint is further reason to safeguard employers from the prospect of liability under the NLRA for providing information to law enforcement authorities.

Respondent tries to avoid the impact of Bill Johnson's, supra, by arguing that it applies only to plaintiffs in a civil lawsuit, not to informers to a law enforcement agency. Respondent's restrictive misreading of Bill Johnson's ignores the compelling public interest in the maintenance of domestic peace recognized by this Court in that case. Citizen cooperation with law enforcement agencies is just as important to the maintenance of public peace as the redress of private wrongs in civil lawsuits. For the same reasons that citizens must enjoy an unfettered right to enforce legal

rights through well-founded civil lawsuits, they must enjoy an unfettered right to seek enforcement of the law by reporting violations of the law to law enforcement agencies.

Respondent contends that the INS was not prevented from enforcing the immigration law as a result of holding Sure-Tan liable for reporting the illegal aliens. (R. Br. 38). This argument ignores the fact, noted earlier in Respondent's Brief, that INS Agent Malin testified at the Board hearing that Petitioners' letter was the sole cause of the INS investigation. (R. Br. 28). Malin's testimony illustrates that the free flow of information from citizens to law enforcement agencies is essential to effective law enforcement. This critical source of information would be seriously jeopardized if citizens could be held liable by one government agency for providing information concerning violations of the law to another government agency.

Respondent also asserts that this case differs from Bill Johnson's because Sure-Tan condoned the illegal aliens' presence in the United States by employing them while they resided in this country. As Respondent properly points out, however, the INA does not prohibit employers from employing illegal aliens, nor does it require employers to report them to the INS. (R. Br. 18-23). Sure-Tan certainly did not forfeit its right to report a violation of the law by not promptly reporting the illegal aliens to the INS, particularly when it was not legally obligated to report them in the first place. There is no suggestion in Bill Johnson's that the compelling public interest in protecting the public peace is conditioned on or limited by when a law enforcement action is taken, or by the motives for taking the action. To the contrary, this Court held in Bill Johnson's that the right to seek enforcement of the

law is protected from the Board's attack, regardless of the employer's motive. 103 S.Ct. at 2170.[4/]

C. Petitioners Have A Constitutional Right To Report A Violation Of The Immigration Laws and Are Not Barred From Asserting That Right Before This Court.

1. Petitioners Have Not Waived Their Constitutional Right To Petition The Government.

Respondent attempts to sidestep Petitioners' Constitutional right to petition the government by asserting that Petitioners are barred from asserting this right under Section 10(e) of the Act because they did not raise this defense before the Board. 29 U.S.C. ¶ 160(e). Respondent further

4/ Respondent maintains that the imposition of liability on Sure-Tan for reporting illegal aliens to the INS is supported by reference to the common law tort of abuse of process. (R. Br. 39 n. 38). Respondent fails to point out that "there is no liability [for abuse of process] where the defendant has done nothing more than carry out the process to its authorized conclusion,

(footnote continued)

contends that Petitioners are barred from raising the First Amendment defense by Supreme Court Rule 21.1(a) because they did not raise this argument before the court of appeals or in their petition for a writ of certiorari.

Footnote 4/ continued

even though with bad intentions." W. Prosser, Handbook of The Law of Torts, 857 4th Ed. (1971). See also Restatement Second of Torts § 682, Comment (B) (1982) ("[T]here is no action for abuse of process when the process is used for the purpose for which it is intended, but there is an incidental motive of spite or an ulterior purpose of benefit to the defendant. Thus the entirely justified prosecution of another on a criminal charge does not become abuse of process merely because the instigator dislikes the accused and enjoys doing him harm; nor does the instigation of justified bankruptcy proceedings become abuse of process merely because the instigator hopes to derive benefit from the closing down of the business of a competitor.") Sure-Tan reported the illegal aliens to the INS for the purpose of having the INS enforce the immigration laws, which is precisely what happened. The fact that Petitioners may have had an ulterior purpose does not make the action an abuse of process. If anything, Respondent's abuse of process analogy supports Petitioners' argument that Sure-Tan's reporting of the illegal aliens to the INS was not illegal, regardless of Petitioners' motives.

Respondent overlooks the fact that Bill Johnson's was decided six months after Petitioners filed their petition for a writ of certiorari. Prior to this Court's decision in Bill Johnson's, the Board had held that a retaliatory motive was the only essential element of a violation of the Act in a situation where an employer sues to enjoin employees from engaging in protected conduct. Id. at 103 S. Ct. 2168. This Court's holding in Bill Johnson's, requiring an inquiry as to the merits of the employer's case as well as the employer's motive, represents a substantial departure from established Board precedent. Such a reversal of Board precedent is precisely the "extraordinary circumstance" contemplated in Section 10(e) of the Act which would justify Petitioners' not having raised this issue before the Board. NLRB v. Lundy Manufacturing Corp., 286 F.2d 424, 426 (2d Cir. 1960).

Likewise, the general principle embodied in Supreme Court Rule 21.1(a) against considering issues not raised in the petition or in courts below is not absolute. This Court has frequently allowed parties to raise issues for the first time before this Court where there has been a significant change in the law since trial. In Curtis Publishing Co. v. Butts, 388 U.S. 130, 144-145 (1967), for instance, this Court held that the failure of Curtis Publishing Company to raise a First Amendment defense at trial did not constitute a waiver of the defense. In Curtis, an intervening decision of this Court substantially changed the governing law. This Court observed that it was not unreasonable for counsel for the plaintiff to rely at trial on defenses provided by current law, and further noted that: "Where the ultimate effect of sustaining a claim of waiver might be an imposition on that

valued freedom [viz., the First Amendment freedom of speech], we are unwilling to find waiver in circumstances which fall short of being clear and compelling." Id at 145.[5/]

Likewise, in the present case, given the state of the law prior to this Court's decision in Bill Johnson's, it was not unreasonable for counsel for Petitioners to rely upon the defenses provided by established Board law. Further, as in Curtis, the effect of sustaining a claim of waiver would be an imposition on a fundamental right -- the right of a citizen to report a violation of the law to a law enforcement

5/ Accord, Uebersee Finanz-Korporation, A. G. v. McGrath, 343 U.S. 205 (1952) (In view of the holding in the intervening case of Kaufman v. Societe Internationale, 343 U.S. 156 (1952), District Court ordered to reopen a case to permit the plaintiff to assert a new defense first enunciated in Kaufman); Rosenblatt v. Baer, 383 U.S. 75 (1966) (Libel case that was tried before this Court decided New York Times Company v. Sullivan, 376 U.S. 254 (1964) was

(footnote continued)

agency -- which lies at the heart of a republican form of government. In Re Quarles, supra at 536.

In the recent case of Sheet Metal Workers International Association, Local 355 v. NLRB, 716 F.2d 1249 (9th Cir., 1983), the Ninth Circuit declined to enforce a Board order where the Board held that a union had violated § 8(b)(1)(A) of the Act by filing a state court lawsuit

---

Footnote 5/ continued

remanded to determine whether the proofs showed that respondent was a "public official" within New York Times rule); Hormel v. Helvering, 312 U.S. 552, 556-557 (1941) (Because of the intervening decision in Helvering v. Clifford, 309 U.S. 331 (1940), this Court allowed the Commissioner of Internal Revenue to rely on § 22(a) of the Revenue Act of 1934, although the Commissioner's argument before the Board of Tax Appeals had rested solely on §§ 166 and 167); NLRB v. Pittsburgh Steamship Company, 337 U.S. 656, 661-662 (1949) (This Court remanded the case to the court of appeals for further consideration in light of the Administrative Procedure Act, 5 U.S.C. § 1001 et seq., which was enacted after the issuance of the Board's order, where impact of APA was not briefed before the court of appeals or before this Court).

against an employee in retaliation for the employee's filing of an unfair labor practice charge. The court held that, in light of this Court's intervening decision in Bill Johnson's, the Board's order was unenforceable because the Board had failed to determine whether the employer's state court action had a reasonable basis. The Ninth Circuit raised the First Amendment defense sua sponte, where the employer had failed to raise this defense either before the Board or before the court of appeals. Likewise, in the present case, this Court should consider Sure-Tan's First Amendment rights in light of the intervening decision in Bill Johnson's, notwithstanding the fact that Petitioners' did not raise the First Amendment defense in prior proceedings.

2. Petitioners' Conduct Was Constitutionally Protected.

Respondent argues that even if Petitioners are not barred from asserting their

Constitutional right to petition the government, Sure-Tan's petition to the INS to investigate the immigration status of its employees does not fall within the ambit of the First Amendment. The Constitutional right to petition the government, Respondent asserts, pertains only to political activity and to civil lawsuits, not to the reporting of violations of the law to law enforcement agencies. (R. Br. 40-41).

Respondent's asserted limitation on the First Amendment right to petition the government is contrary to established law. In Forro Precision, Inc. v. International Business Machines Corp., 673 F.2d 1045, 1059-1060 (9th Cir. 1982), the Ninth Circuit held that the First Amendment right to petition the government applied to IBM's approach to a law enforcement agency which resulted in a police search of a competitor's premises and the indictment of ten individuals. The court observed that:

> We do not liken an approach to the police for aid in apprehending wrongdoers to political activity. However, we think that the public policies served by ensuring the free flow of information to the police, although somewhat different from those served by Noerr-Pennington, are equally strong. Encouraging citizen communication with police does not generally promote the free exchange of ideas, nor does it provide citizens with the opportunity to influence policy decisions. Compare Noerr, 365 U.S. at 137-38, 81 S. Ct. at 529-30. Nonetheless, it would be difficult indeed for law enforcement authorities to discharge their duties if citizens were in any way discouraged from providing information. We therefore hold that the Noerr-Pennington doctrine applies to citizen communications with police. Id. at 1060.

Respondent than falls back to the argument that, even if the reporting of a violation of the law constitutes a petition to the government within the meaning of the First Amendment, this Court did not preclude the finding of an unfair labor practice where the First Amendment right to petition the government is involved. Rather, Bill Johnson's only requires the Board to be "sensitive to First Amendment values" in

construing the NLRA. (R. Br. 42). Respondent in effect argues that once the Board has paid nodding obeisance to the First Amendment, it is free to abridge First Amendment rights in situations where the Board concludes that an employer has acted with an improper motive. (R. Br. 42).

This Court, however, did not require mere "sensitivity" to First Amendment rights in Bill Johnson's. Rather, this Court held categorically that, in light of the First Amendment right to petition and the compelling state interest in maintaining domestic peace, a well-founded petition to the government may not be enjoined as an unfair labor practice, even if the action would not have been taken but for the employer's desire to retaliate against an employee. 103 S.Ct. at 2170.[6/]

6/ Respondent maintains that this Court suggested in Quarles, supra, that the right of a citizen to inform a law enforcement

(footnote continued)

Respondent also asserts that the Constitution does not protect the reporting of a crime if the action was "deliberately based upon an unjustifiable standard such

---

Footnote 6/ continued

agency of the commission of a crime is a privilege that inures to the benefit of the government rather than to the informer personally. The government, Respondent argues, can therefore abridge this Constitutional right in order to accommodate "another compelling 'necessity of the government' as reflected in the NLRA." (R. Br. 42 n. 41). Contrary to Respondent's assertion, this Court stated unequivocally in Quarles that citizens have a right to inform law enforcement agencies of a violation of the law, and the government has the duty to protect that right. The government's duty to protect that right arises both from the interest of the informant and from the necessity of the government itself, which depends for successful law enforcement upon the willingness of citizens to report violations of the law. Id. at 158 U. S. 536. Respondent overlooks the fact that the rights of citizens in this nation are not divorced from the rights of the government; nor are individual rights at the mercy government convenience. By making Constitutional rights subservient to the Board's convenience, the General Counsel continues to "use only its private knothole to view these issues and sees nothing except its own labor goals." (J. Wood, Dissent to Order Denying Sure-Tan's Request for Rehearing; 38a).

as race, religion or other arbitrary classification." Citing Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)), Respondent contends that one such arbitrary classification is "based upon the exercise by employees of rights protected by the NLRA." (R. Br. 43). Bordenkircher and Oyler, however, concerned petitions for writs of habeas corpus filed by prisoners who claimed that conduct by state prosecutors violated their Fourteenth Amendment equal protection and due process rights. The Fourteenth Amendment applies only to state actions, not to actions by individuals who are not acting under the color of state law. Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978). The Fourteenth Amendment erects no shield against merely private conduct. Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

Even if the Fourteenth Amendment were applicable to individuals -- which is clearly

not the case -- individuals who exercise rights protected by the NLRA have not been identified by this Court as an "arbitrary classification" offensive to the equal protection clause of the Fourteenth Amendment.[7/] Respondent is in effect attempting to elevate the rights created by Congress under the NLRA to the status of Constitutional rights by means of the Fourteenth Amendment. This attempt to incorporate the NLRA into the Fourteenth Amendment is plainly contrary to the Court's holding in Bill Johnson's that the rights created under the NLRA are subordinate to Constitutional rights and must be

---

7/ Petitioner argues that Congress has the power to identify employees who exercise rights protected by the NLRA as an arbitrary classification offensive to the Fourteenth Amendment equal protection clause. Such a suggestion is plainly wrong. It is the the role of this Court, not Congress, to interpret the Fourteenth Amendment.

interpreted so as not to abridge Constitutional rights.[8/]

II. THE BACKPAY AWARD DOES NOT EFFECTUATE THE POLICIES OF THE ACT AND CONFLICTS WITH THE IMMIGRATION LAWS.

A. The Backpay Award Does Not Effectuate The Policies Of The Act.

Respondent argues that the court of appeals' six-month backpay award effectuates the policies of the Act and is therefore appropriate, notwithstanding the blatantly speculative nature of the award. (R. Br. 43-45). On the basis of a Department of Labor study, Respondent asserts that the illegal aliens could have been expected to remain illegally in this country for some unspecified additional period of time in the absence of Sure-Tan's inquiry to the INS. (R. Br. 44 n. 42).

8/ Accord, NLRB v. Virginia Electric & Power Co., 314 U.S. 469 (1941) (NLRA cannot abridge freedom of speech guaranteed by First Amendment).

The Department of Labor study provides no basis for the six-month backpay period, nor does it eliminate the speculative nature of the award. Respondent concedes that the six-month period is speculative, but argues, relying upon Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 265 (1946), that such speculation is permissible where the uncertainty was occasioned by the employer's actions. (R. Br. 45). This Court observed in Bigelow, however, that: "even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork." 327 U.S. at 264.

The Board itself recognized that the policies of the Act are not effectuated by such a speculative backpay award. The Board would have tolled the accrual of backpay during the period the illegal aliens were unavailable for work because of

enforced absence from the country. (41a). In analogous situations, the Board has tolled the accrual of backpay during periods when employees are unavailable for work because of incarceration for criminal violations. Gifford-Hill & Company, 188 N.L.R.B. 337, 338 (1971); Keco Industries, Inc., 121 N.L.R.B. 1213, 1228 (1958).[9/]

B. The Backpay Award Is Inconsistent With The INA.

Respondent argues that there is no inconsistency between the INA and the NLRA "if the NLRA is applied to the employment relationship entered by an undocumented alien prior to the execution of the statutory remedy of deportation." (R. Br. 22).

9/ Respondent cites a number of cases holding that backpay would not be tolled if the employees' unavailability for work is due to illness or injury fairly attributable to the offending employer. American Manufacturing Company of Texas, 167 N.L.R.B. 520, 522-523 (1967) (Backpay period is not tolled during the period of illness

(footnote continued)

There is an inconsistency between the INA and the NLRA, however, if the NLRA is applied to the employment relationship after an illegal alien is deported. The INA specifically calls for the deportation of aliens who unlawfully enter this country

---

Footnote 9/ continued

attributable to interim employment); Fabric Mart Draperies, Inc., 182 N.L.R.B. 390 (1970) (Backpay not tolled during period when employee was unable to work because of illness which was attributable to the unlawful conduct of the employer); Graves Trucking, Inc., 246 N.L.R.B. 344, 345 (1979), enforced as modified 692 F.2d 470, 474-477 (7th Cir. 1982) (Backpay awarded for a period when employee was recuperating from physical injuries inflicted by a supervisor); Moss Planing Mill Co., 103 N.L.R.B. 414 (1953), enforced 206 F.2d 557 (4th Cir. 1953) (Backpay period was not tolled where the employee's incapacity to work was caused by the physical injury inflicted upon him by the employer).

None of these cases involve unavailability for work attributable to an employee's arrest for a violation of the law. In more analogous cases, the Board has tolled backpay where the unavailability for work is occasioned by the employee's arrest or incarceration for a violation of the law. Gifford-Hill & Company, 188 N.L.R.B. 337, 338 (1971); Keco Industries, Inc. 121 N.L.R.B. 1213, 1228 (1958).

or who enter lawfully and fail to maintain their lawful status. 8 U.S.C. 1251(a)(2) and (9). By applying the NLRA to the illegal aliens after their deportation, and awarding them backpay for a period of time when they were in Mexico and unable to lawfully reenter this country, the Board creates a fundamental conflict between the INA and the NLRA; in effect, the Board treats the INA as if it were of no consequence.[10/]

Respondent attempts to sidestep this conflict by suggesting that the backpay

---

10/ Respondent argues that the inability of the Board to provide an effective remedy would invite a repetition of acts of discrimination in the future and undermine the rights of Petitioners' non-alien employees. (R. Br. 43). The Board, however, is not authorized to impose arbitrary, punitive remedies under any circumstances. (See P. Br. at 24-28). If it be assumed, contrary to fact, that Petitioners' inquiry to the INS constituted an unlawful constructive discharge, Respondent could order backpay in accordance with normal Board procedures, which would call for tolling of backpay during periods when the aliens were unavailable for work. See pages 26-28, supra.

award vindicates public rather than private rights. (R. Br. 46). Regardless of the rights which are vindicated, there is no escaping the fact that the purpose of the INA is flouted by treating illegal aliens as though they had a right to remain in this country illegally for another six months after their deportation and rewarding them for their illegal presence in this country with six-months' backpay.[11/]

III. THE COURT OF APPEALS' DECISION REGARDING THE OFFERS OF REINSTATEMENT IS UNREASONABLE AND CONTRARY TO BOARD PRECEDENT.

Respondent acknowledges that the court of appeals improperly usurped the role of

---

11/ Respondent argues that the backpay award would not encourage illegal immigration because the illegal aliens would be entitled to the backpay regardless of their presence in this country. The court of appeals and the Board's own General Counsel, however, recognize that a backpay award would provide an incentive for the aliens to reenter the country illegally. (18a; 55a).

the Board by enlarging the Board's remedial order rather than remanding the order to the Board for reconsideration. Respondent nevertheless contends that the court's expanded remedial order, which requires Sure-Tan to send reinstatement offers to the aliens written in Spanish by method allowing verification of receipt and to leave the reinstatement offers open for four years, reasonably effectuates the purposes of the Act. (R. Br. 47).

Respondent relies on Carruthers Ready Mix, Inc., 262 N.L.R.B. 739 (1982); Monroe Feed Store, 122 N.L.R.B. 1479, 1480-1481 (1959); and Rutter-Rex Manufacturing Company, 158 N.L.R.B. 1414, 1424 (1966), enforced as modified, 399 F.2d 356 (5th Cir. 1968), reversed as to modification, 396 U.S. 258 (1969), to support the requirements that the reinstatement offers be made in Spanish and be sent in a manner permitting verification of receipt. (R. Br. 48). None of

these cases, however, require that reinstatement offers be made in an employee's native language. Nor do these cases require that reinstatement offers be sent in a manner permitting verification of receipt.

In contrast, General Iron Corp., 218 N.L.R.B. 770 (1975), enforced 538 F.2d 312 (2d Cir. 1976), (discussed in Petitioners' Brief at 31), specifically holds that reinstatement offers to Spanish-speaking employees need not be written in Spanish or sent by means permitting verification of receipt.12/

Respondent attempts to justify the court of appeals' requirement that the offers of reinstatement be kept open for

12/ Respondent argues that the Board in General Iron Corp., supra, noted that Spanish-speaking employees who receive an English reinstatement offer often consult an English-speaking child, friend or neighbor to read the letter, which would be impractical if the employee has returned to Mexico. It is certainly not unreasonable, however, for an employer to write a reinstatement offer

(footnote continued)

four years on the grounds that it may take the illegal aliens four years to obtain visas to legally reenter the country. According to information provided to Respondent by the INS, however, no visas are available for nonpreference aliens such as those in the present case. (R. Br. 49 n. 47). Thus, there is no reasonable relationship whatever between the four year reinstatement period and the time required for the illegal aliens to reenter this country lawfully.

Footnote 12/ continued

in English when it has communicated verbally with the employees in English throughout the time they worked for the employer. Furthermore, as noted by the Board: "Some individuals who cannot readily speak English often can read that language. An offer to return to work does not require any great knowledge of the English language to be understood." Id. at 770-771. The Board also noted that the fact that a reinstatement offer is not sent by registered mail, return receipt requested, does not invalidate the offer. Rather, the issue of proof of service is a matter to be determined in the compliance stage. Id. at 771.

Relying on Fredeman's Calcasieu Locks Shipyard, Inc., 208 N.L.R.B. 839 (1974), Respondent argues that a reasonable time for a reinstatement offer to remain open depends upon the circumstances affecting the individual employee at the time of receipt of the offer. In the present case, the circumstances are that the illegal aliens in question are unskilled laborers who may never obtain visas to reenter this country legally. Those circumstances cannot be changed, and do not provide a reasonable basis for treating the aliens with greater deference than American citizens.[13/] The 30-day period for which Petitioners' offers were held open accords with established Board precedent and should be upheld.

13/ Cf., Keco Industries Inc., supra at 1227 (Special provision should not be made for a reinstatement offer to an employee who was unavailable for work by reason of incarceration).

CONCLUSION

For the foregoing reasons, and the reasons advanced in Petitioners' Brief, the decision of the Board and the decision of the court of appeals, holding that Petitioners' inquiry to the INS was an unlawful constructive discharge, should be reversed. This case should be remanded to the court of appeals with instructions to modify the decree of enforcement to exclude the requirement that the illegal aliens be reinstated with backpay. If this Court holds that Sure-Tan's request to the INS violated Section 8(a)(3) of the Act, the enforcement decree should be modified to require the tolling of the accrual of backpay during the periods the aliens were unavailable for work because of enforced absence from the country. The decree should be further modified to exclude the requirement that

Sure-Tan send revised reinstatement offers to the aliens.

Michael R. Flaherty
KECK, MAHIN & CATE
8300 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
(312) 876-3400

Counsel for Petitioners

OF COUNSEL:

John A. McDonald
Robert A. Creamer
Steven H. Adelman, P.C.